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ENCORP ISKANDAR DEVELOPMENT SDN BHD v. KONSORTIUM IPMINES MERZ SDN BHD & ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
CHE MOHD RUZIMA GHAZALI JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NOS: B-02(C)(A)-981-08-2020
& B-02(C)(A)-984-08-2020]
21 AUGUST 2023

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Abstract – *(i) In a dispute on non-payment of claims, if the main agreement is entered into prior to the coming into force of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'), an adjudicator does not possess the necessary statutory authority to adjudicate and decide, thus rendering any adjudication decision to be flawed and void; (ii) An adjudicator has breached s. 12(2)(a) and/or (b) of the CIPAA if the delivery of his decision exceeds the mandatory time period. Even if it is only one day late, it does not make it any less fatal.*

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CONSTRUCTION LAW: *Adjudication – Proceedings – Dispute on non-payment of claims – Application to set aside adjudication decision – Whether adjudicator possessed necessary statutory authority to adjudicate and decide on dispute – Whether Construction Industry Payment and Adjudication Act 2012 ('CIPAA') applicable – Whether there was breach of s. 12(2)(a) and (3) of CIPAA – Whether adjudication decision void, unenforceable and ought to be set aside*

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CONSTRUCTION LAW: *Adjudication – Adjudication decision – Setting aside – Application for – Dispute on non-payment of claims – Whether adjudicator possessed necessary statutory authority to adjudicate and decide on dispute – Whether Construction Industry Payment and Adjudication Act 2012 ('CIPAA') applicable – Whether there was breach of s. 12(2)(a) and (3) of CIPAA – Whether adjudication decision void, unenforceable and ought to be set aside*

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The appellant was the owner of a mixed development project ('project') and *vide* a letter of award ('main agreement') had appointed its associate company, Encorp Construct Sdn Bhd ('ECSB') as its main constructor for the project. ECSB then engaged the respondent as its subcontractor for the project *vide* a subcontract agreement ('subcontract'). Thereafter, the respondent, ECSB and the defendant entered into a novation agreement where it was agreed by all concerned, that the appellant shall assume ECSB's position and obligations under the main agreement and that all terms under the said main agreement should remain. It was also agreed that the subcontract between

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ECSB and the respondent should forthwith be terminated. Later, disputes emerged between the respondent and the appellant over payment for work done for which the respondent claimed was not paid for, totalling RM27,355,211.06. When the appellant failed to pay, the respondent commenced an adjudication claim under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). An adjudicator was appointed to determine the dispute. In the course of the adjudication, the appellant challenged the adjudicator's jurisdiction, which was dismissed by the adjudicator who then proceeded to deliver his adjudication decision ('AD'). In brief, the adjudicator ordered for, *inter alia*, the appellant to pay the respondent RM13,747,780.16. Aggrieved by the said AD, the appellant applied to the High Court to set aside the AD and to stay the enforcement of the same, pending arbitration between the parties, pursuant to ss. 15 and 16 of the CIPAA *vide* OS 103. Shortly thereafter, the respondent applied to enforce the same AD *vide* s. 28 of the same Act *vide* OS 121. The High Court Judge ('HCJ') ruled that the adjudicator was cloaked with jurisdiction to hear and decide on the respondent's claim and found that the appellant had failed to discharge the burden to set aside the AD. Consequently, the HCJ allowed the respondent's application in OS 121 and dismissed the appellant's application in OS 103. Hence, these appeals. The issues that arose were, *inter alia*, (i) whether CIPAA applied to the main agreement (the letter of award) or to the novation agreement; (ii) whether the adjudicator had breached s. 12(2)(a) and (3) of the CIPAA; and (iii) whether the AD should be stayed pending disposal of arbitration.

Held (allowing appeals)
Per Ahmad Zaidi Ibrahim JCA delivering the judgment of the court:

(1) There were two agreements *ie*, the main agreement which was entered prior to the coming into force of the CIPAA and the novation agreement, which was contracted post-CIPAA. It was the intention of the parties that the novation agreement was only to substitute parties, whilst at the same time, maintaining all the conditions and terms of the main agreement. Since it was agreed in the novation agreement that the respondent could derive the benefits of the works from the date of the main agreement, similarly the respondent's obligation must necessarily also commence from the date of the main agreement *ie*, from 6 August 2013. Thus, the adjudicator did not possess the necessary statutory authority to adjudicate and to decide on the respondent's claim herein under the CIPAA. As the main agreement was pre-CIPAA, the adjudicator was *sans* of jurisdiction to adjudicate the respondent's claim. Consequently, the AD was found to be flawed and void from the word go. The AD was, therefore, set aside. (paras 34-38)

(2) Factually, the respondent had served its adjudication reply on the adjudicator on 18 July 2019. Therefore, the adjudication decision should be delivered on 25 September 2019 being 45 working days from 18 July 2019. However, the adjudicator only delivered his decision on 26 September 2019. Thus, the adjudicator had exceeded the mandatory time period by one day. Section 12(2)(c) of the CIPAA stipulates that the adjudicator shall decide the dispute and deliver the adjudication decision 'within such further time as agreed to by the parties.' Alas, there was no agreement or consent from the parties obtained by the adjudicator to extend the delivery date for the AD beyond the mandatory 45 days. Nor was there any request by the adjudicator to extend such statutory timeline. As the adjudicator only delivered his decision on 26 September 2019, the adjudicator had exceeded the mandatory time period by one day. The fact that it was only one day late did not make it less fatal. This was because of the mandatory provision of s. 12(2)(a) and/or (b) of the CIPAA. The AD which was delivered one day past the mandatory 45 days pursuant to s. 12(2)(a) of the CIPAA was therefore void and unenforceable. (paras 50-58)

(3) There were clear unequivocal errors on the part of the adjudicator, thus injustice would be occasioned on the appellant if the respondent was allowed to enforce the AD which was void and unenforceable. Hence, there was merit to grant a stay of enforcement of the AD pending arbitration. The order of the HCJ in dismissing the appellant's application for stay of enforcement pending arbitration was also set aside accordingly. (paras 74 & 75)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] 1 LNS 1522 CA ***(refd)***

ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd & Other Appeals [2023] 7 CLJ 374 CA ***(refd)***

Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd [2015] 8 CLJ 728 HC ***(refd)***

EA Technique (M) Sdn Bhd v. Malaysia Marine and Heavy Engineering Sdn Bhd [2020] 1 LNS 1264 HC ***(refd)***

Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd [2019] 2 CLJ 229 CA ***(refd)***

Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal [2020] 1 CLJ 299 FC ***(refd)***

LYL Hooker Sdn Bhd v. Tevanaigam Savisthri KT Chitty & Anor [1987] 1 CLJ 356; [1987] CLJ (Rep) 179 SC ***(refd)***

Pasukhas Sdn Bhd v. Empire Multiple Sdn Bhd & Another Case [2019] 1 LNS 757 HC ***(refd)***

Toeh Kee Keong v. Tambun Mining Co Ltd [1967] 1 LNS 197 FC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC ***(refd)***

Legislation referred to:
Construction Industry Payment and Adjudication Act 2012, ss. 2, 4, 12(2)(a), (b), (c), (3), (7), 15(b), (d), 16, 25(f), (i), (m), 27(3), 28
Contracts Act 1950, s. 63
Rules of Court 2012, O. 28 r. 3C(1), O. 38 r. 2(2)

For the appellant/defendant - Steven Seah Shu Keen & Rosmirah Insyirah Zamri; M/s PY Hoh & Tai
For the respondent/plaintiff - K Muralidharan & Tan Han Sam, M/s Wong & Kiu

[Editor's note: For the High Court judgment, please see Encorp Iskandar Development Sdn Bhd v. Konsortium Ipmines Merz Sdn Bhd & Another Case [2021] 1 LNS 871 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Zaidi Ibrahim JCA:

Introduction

[1] There are two appeals filed herein, both by the appellant, Encorp Iskandar Development Sdn Bhd. The respondent in both the appeals is Konsortium Ipmines Merz Sdn Bhd. Both the appeals are against the decision of the Shah Alam High Court dated 29 July 2020. The High Court decision emanated from the adjudication decision (AD) of Mr Foo Joon Liang (the adjudicator) dated 26 September 2019. The AD was issued under the Construction Industry Payment and Adjudication Act, 2012 (CIPAA) pursuant to an adjudication commenced by the respondent against the appellant for payment for work done. As to the outcome of the adjudication, in a nutshell, the adjudicator allowed the respondent's claim against the appellant.

[2] Flowing from the abovesaid AD, the appellant applied to the Shah Alam High Court *vide* Saman Pemula No: BA-24C-103-10/2019 (OS: 103), to set aside the AD and to stay the enforcement of the same, pending arbitration between the parties, pursuant to ss. 15 and 16 of the CIPAA. This was followed by the respondent applying to enforce the same AD under s. 28 of the same Act *vide* Saman Pemula No.: BA-24C-121-12/2019 (OS: 121). The learned High Court Judge (HCJ) heard both the OS at one go.

[3] On 29 July 2020, the learned HCJ dismissed the appellant's application (OS: 103) and at the same instance, allowed the respondent's application (OS: 121).

[4] Aggrieved, the appellant appealed to the Court of Appeal against both the decisions abovementioned. Hence, the appeals before us herein. For both the appeals, the learned HCJ had prepared one common grounds of judgment.

A **Our Decision**

[5] We heard both the appeals together, and after having appraised the records of appeal for both the appeals, including the grounds of judgment (GOJ) of the learned HCJ and having considered the submissions by both learned counsels, we unanimously found that there are merits in the
B appellant's appeals. Thus, we allowed the appeals and consequently set aside the decisions and the orders of the learned HCJ dated 29 July 2020. Effectively, the AD dated 26 September 2019 is also accordingly set aside.

[6] We allowed the appeals abovesaid on the following grounds.

C **Factual Background And Chronology of Events**

[7] The relevant undisputed facts and chronology of events are:

The adjudication

(i) the appellant is the owner of a mixed development project in Johor
D Bahru, Johor Darul Takzim known as "Cadangan Pembangunan Pangsapuri Servis (571 unit) Dan Ruang Niaga ..." (the project).

(ii) 6 August 2013 - *vide* a letter of award dated 6 August 2013 (the main agreement), the appellant appointed its associate company Encorp Construct Sdn Bhd (ECSB), as its main constructor for the project.
E (See: "appeal record, vol. 2B" pp. 289 to 294).

(iii) 24 October 2014 - ECSB then engaged the respondent as its subcontractor for the project *vide* a subcontract agreement dated 24 October 2014 (subcontract).

F (iv) 30 June 2015 - thereafter, the respondent, ECSB and the defendant entered into a novation agreement dated 30 June 2015 where it was agreed by all concerned, that the appellant shall assume ECSB's position and obligations under the main agreement. It was agreed that all terms under the said main agreement shall remain. It was also
G agreed that the subcontract between ECSB and the respondent dated 24 October 2014 shall forthwith be terminated (see: "appeal record, vol. 2B", pp. 295 to 301).

(v) later, disputes emerged between the respondent and the appellant over payment for work done for which the respondent claimed was not paid
H for, totalling RM27,355,211.06. When the appellant failed to pay, the respondent commenced an adjudication claim under CIPAA wherein, the following events took place:

(a) 7 March 2019 - the respondent served on the appellant its payment claim (PC) dated 7 March 2019;

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(b) 18 March 2019 - the appellant responded by serving on the respondent its payment response (PR) dated 18 March 2019; and

(c) 26 March 2019 - notice of adjudication dated 29 March 2019 was issued.

(vi) 20 June 2019 - Mr Foo Joon Liang was appointed as adjudicator on 20 June 2019 to determine the dispute. The adjudicator's office and business address is in Kuala Lumpur.

(vii) 26 September 2019 - in the course of the adjudication, the appellant's counsel challenged the adjudicator's jurisdiction. The challenge was dismissed by the adjudicator who then proceeded to deliver his AD on 26 September 2019.

(viii) 1 October 2019 - subsequently, counsel for the respondent discovered 'mistake' in the computation of the amount of claim allowed in the AD abovesaid. So, counsel wrote to the adjudicator *vide* letter dated 1 October 2019. The said letter was copied to the appellant's counsel.

(ix) 4 October 2019 - before the appellant's counsel could respond to the respondent's letter abovesaid, *vide* letter dated 4 October 2019 sent to counsels for both parties, the adjudicator 'corrected' his AD (corrected AD).

(x) 8 October 2019 - as per letter dated 8 October 2019 to the adjudicator (and copied to the respondent's counsel) the appellant's counsel objected to the corrected AD, firstly, for not being given the opportunity to reply to the appellant's letter dated 1 October 2019 and secondly, that there were two errors in the said corrected AD.

(xi) 22 October 2019 - flowing from the appellant's letter dated 8 October 2019 abovesaid, on 22 October 2019 the adjudicator issued yet another corrective AD (second corrected AD).

(xii) 24 October 2019 - two days later, *vide* letter dated 24 October 2019 the adjudicator again corrected his abovesaid AD (third corrected AD).

[8] In brief, the adjudicator ordered the following:

(i) appellant to pay the respondent RM13,747,780.16;

(ii) appellant to pay interest on the said amount;

(iii) appellant to pay the costs of the adjudication totalling RM75,000.

[9] The appellant averred that, the adjudicator had applied the *quantum meruit* doctrine. (See: rekod rayuan, Jilid 2C, pp. 474 to 477).

[10] As earlier mentioned at paras. [3] and [4], aggrieved by the abovesaid AD, the appellant applied to the High Court to set aside the AD *vide* OS: 103. Shortly thereafter, the respondent applied to enforce the AD *vide* OS: 121.

Issues Before The High Court

[11] The issues set down for determination by the HCJ are:

(i) whether CIPAA applies to the main agreement (the letter of award) or to the novation agreement?

(ii) did the adjudicator exceed his jurisdiction by applying the *quantum meruit* doctrine?

(iii) whether the adjudicator had breached s. 12(2)(a) of the CIPAA?

(iv) whether the adjudicator was in breach in correcting the AD?

(v) whether the court can review the AD pursuant to s.15 of the CIPAA?

(vi) whether the court should stay the AD pending disposal of arbitration?

Decision/Findings By The learned HCJ

[12] Basically, before the High Court for the application to set aside and for stay of enforcement (OS: 103), the appellant's counsel repeated and resubmitted the jurisdictional challenges raised before the adjudicator. However, yet again, it was dismissed, this time by the learned HCJ. The learned HCJ ruled that the adjudicator was cloaked with the jurisdiction to hear and to decide on the respondent's claim. The learned HCJ found that the appellant failed to discharge the burden to set aside the AD.

[13] Consequently, the learned HCJ allowed the respondent's application (OS: 121), having found the three conditions as laid down in *Inai Kiara Sdn Bhd v. Puteri Nusantara Sdn Bhd* [2019] 2 CLJ 229 had been satisfied. (See: GOJ paras. 41 to 43).

[14] In dismissing the appellant's application (OS: 103) and in allowing the respondent's application (OS: 121), the learned HCJ made the following rulings/findings regarding the issues abovesaid:

(i) for issue (i), that CIPAA applies to the novation agreement, not the main agreement. (See: GOJ paras. 8 to 10);

(ii) for issue (ii), that the adjudicator did not exceed his jurisdiction concerning the application of the *quantum meruit* doctrine. (see: GOJ paras. 11 to 17);

(iii) for issue (iii), that the adjudicator did not breach s. 12(2)(a) CIPAA. (See: GOJ paras. 18 to 23);

(iv) for issue (iv), that the adjudicator was not in breach in correcting the AD. (See: GOJ paras. 24 to 26).

(v) for issue (v), that the court has the power under s. 15 of the CIPAA to review the AD. (See: GOJ paras. 30-33).

(vi) for issue (vi), that there was no special circumstance to stay the enforcement of the AD pending arbitration between the parties. (See: GOJ paras. 35 to 40).

Our Findings And Decision On The Issues Raised

[15] Issues (i) to (iii) concerned the appellant's jurisdictional challenges which were dismissed by the adjudicator.

[16] Foremost, as to the issues abovementioned, we shall first deal with issues (i) and (iii) as in our view, they will have a determinative effect on both the appellant's appeals herein. Thereafter, for completeness, issue (ii) and the other remaining issues will be dealt with accordingly.

[17] In a nutshell, the appellant's counsel said that the adjudicator had exceeded his statutory power by determining a claim that was not covered under CIPAA and in issuing his AD beyond the mandated statutory timeline.

[18] Pertaining to the jurisdictional challenges of the appellant, we are minded of s. 27(3) of the CIPAA which states the following:

> 27. Jurisdiction of adjudicator
>
> (1) ...
>
> (2) ...
>
> (3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under s. 15 or to oppose the application to enforce the adjudication decision under subsection 28(2).

[19] In dismissing the jurisdictional challenges of the appellant, the adjudicator had acted pursuant to the abovementioned provision. Based on the aforesaid provision, we are not persuaded that the adjudicator's dismissal of the appellant's jurisdictional challenges and henceforth to proceed to determine the respondent's claim, to be a wrong exercise of discretion by the adjudicator. Crucially, in our view, the appellant failed to show that it had been prejudiced by the said dismissal. We said so because the statutory right to apply to set aside the AD and/or to oppose the enforcement of the same under the abovesaid provision remained intact and was never taken away from the appellant. Thus, we are not convinced that the exercise of discretion by the adjudicator was wrong or erroneous.

[20] We will now deal with the merits of the appellant's setting aside application that was dismissed by the HCJ. The learned HCJ disagreed with the appellant's jurisdictional challenges and ruled that the adjudicator is empowered to adjudicate the respondent's claim herein under CIPAA.

[21] The law is trite and settled that pursuant to s. 15 of the CIPAA, an AD can be set aside on the following four grounds:

(a) the AD was improperly procured through fraud or bribery;

(b) there was a denial of natural justice;

(c) the adjudicator failed to act independently or impartially; or

(d) the adjudicator had exceeded his jurisdiction.

[22] Based on the appellant's memorandum of appeal, for the application to set aside the AD, the appellant had relied on grounds (b), (c) and (d) abovementioned. However, before us, much emphasis and focus were spent on ground (d) *ie*, the question on jurisdiction. Tied up closely to ground (d) are issues (i) and (iii).

[23] Counsel for the appellant submitted that if we were to agree with the appellant's counsel that the learned HCJ was in error, then both the appellant's appeals must be allowed and the AD be set aside. We agreed with the said contention and in our view, ground (d) banded together with issues (i) and (iii) are determinative of the appellant's appeals and will effectively resolve the other remaining issues.

[24] As prior mentioned, for ground (d), the crux of the appellant's submission before us was that the adjudicator had exceeded his jurisdiction and for this, the learned counsel re-hatched the appellant's submissions made before the adjudicator and the learned HCJ. Firstly, counsel contended that the claim was outside the scope and ambit of CIPAA. In addition, the appellant averred that the adjudicator had exceeded the mandatory timeline when delivering his AD. For ground (d), we will take issues (i) and (iii) together.

Issue (i)

Whether CIPAA Applies To The Main Agreement (The Letter Of Award) Or To The Novation Agreement

[25] The learned HCJ in agreeing with counsel for the respondent, ruled that the respondent's claim is based on the novation agreement, not the main agreement and thus ruled that CIPAA governs the respondent's claim.

[26] Foremost, it is undeniable that CIPAA is not applicable retrospectively. Herein, it is factually undisputed that there are two agreements *ie*, the main agreement, which was entered prior to the coming into force of CIPAA and the novation agreement, which was contracted post-CIPAA. The adjudicator found that the respondent's claim was based on the novation agreement and as such ruled that CIPAA is applicable. Accordingly, the adjudicator ruled that he had the power and authority to adjudicate the respondent's claim. The learned HCJ agreed with the adjudicator's ruling/decision.

[27] Learned counsel for the appellant submitted that both the adjudicator and the learned HCJ had erred in their respective ruling/decision. The appellant contended that the respondent's claim is based on the main agreement and not the novation agreement. Since the main agreement (letter of award) was entered before or deemed to have entered before the CIPAA *ie*, on 6 August 2013, counsel submitted that the dispute between the parties does not fall within the ambit of CIPAA and as such, the adjudicator did not possess the necessary jurisdiction to make such determination on the respondent's claim.

[28] According to counsel, based on the terms and conditions of the novation agreement, the parties are deemed to have entered into the main agreement wholly on 6 August 2013. As such, the counsel submitted that the adjudicator was not empowered to adjudicate and to decide on the said claim under CIPAA. In support, the counsel referred to the case of *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal* [2020] 1 CLJ 299 wherein the Federal Court held the following:

> [72] We see no reason, in the lights of our deliberation above, to be persuaded by the appellant's argument that the of CIPAA is a legislation of general application. The provisions of the CIPAA undoubtedly affect the substantive rights of parties and such rights ought not to be violated as it is of fundamental importance to the respondent besides being an essential component of the rule of law. **Consequently, the entire Act ought to be applied prospectively**. In our judgment, any interpretation that the CIPAA takes effect retrospectively inhibits the exercise of the respondent's vested right in accordance with the bargain entered into between the parties. The outcome, as earlier indicated is that both questions of law allowed by this Court at the leave stage must be answered in the negative. In the upshot, **the entire adjudication proceedings including the adjudication decision are rendered void**. The glaring conclusion which emerged is that the appellant is unsuccessful in all of their contentions. Absent any express intention by Parliament that the CIPAA is to be applied retrospectively, **the CIPAA can only be applied prospectively. The adjudication decision therefore ought to be set aside**. (emphasis added)

[29] As we see it, the appellant's reliance on the decision of *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* abovesaid hinges on this court agreeing with its contention/submission that the respondent's claim is based on the main agreement (letter of award) and not the novation agreement.

[30] Learned counsel for the respondent submitted that both the adjudicator and the learned HCJ were correct in their decision in brushing off the jurisdictional challenge of the appellant. According to the counsel, contrary to the appellant's counsel contention, the respondent's claim was premised on the novation agreement and since the novation agreement was entered on 30 June 2015, CIPAA is clearly applicable. Thus, both the adjudicator and the learned HCJ were correct.

[31] The learned HCJ opined that the novation agreement is a new contract which came into force on 30 June 2015 and which had extinguished the previous agreement. Thus, as the novation agreement came into effect on 30 June 2015 *ie*, after the coming into effect of CIPAA, the learned HCJ ruled that CIPAA applies to the respondent's claim and the adjudicator is empowered to adjudicate the respondent's claim.

[32] His Lordship referred to the cases of *LYL Hooker Sdn Bhd v. Tevanaigam Savisthri KT Chitty & Anor* [1987] 1 CLJ 356; [1987] CLJ (Rep) 179; [1987] 2 MLJ 52 and *Toeh Kee Keong v. Tambun Mining Co Ltd* [1967] 1 LNS 197; [1968] 1 MLJ 39. The HCJ also referred to s. 63 of the Contracts Act 1950 which states as follows:

Section 63 Effect of novation, rescission and alteration of contract

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

ILLUSTRATIONS

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B RM10,000. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for RM5,000 in place of the debt of RM10,000. This is a new contract and extinguishes the old.

(c) A owes B RM1,000 under a contract. B owes C RM1,000. B orders A to credit C with RM1,000 in his books, but C does not assent to the agreement. B still owes C RM1,000, and no new contract has been entered into.

Our Findings/Ruling

[33] In order to understand the intention of the parties as to the effect of the novation agreement *vis-a-vis* the main agreement, it is helpful in our view, to look at the following terms and conditions of the said novation agreement. In cls. 16.1, 16.2 and 16.3, the parties agreed to the following:

> **16. The Effect of the novation agreement**
>
> 16.1 With effect on and from the Novation Date, the Parties:
>
> (a) agree to novate the Main Contract to *substitute the Substitute Party for the Original Party* as a party to the Main Contract;
>
> (b) agree that the Main Contract *continues as an agreement on the same terms as previously except* that references to the Original Party will be read and construed *as if they were references to the Substitute Party*;
>
> (c) agree that references in the Main Contract (and any document agreed by the Parties and duly executed pursuant to the Main Contract) to the Original Party will be read and construed *as if they were references to the Substitute Party*;
>
> (d) agree that this Agreement is entered into for valuable consideration including the mutual covenants and promises set out in this Agreement, the sufficiency of which is acknowledged by each Parties.
>
> 16.2 The Substitute Party undertakes to perform and *assume all of the rights, obligations, liabilities (including any Claim) and benefits of the Original Party under the Main Contract in favour of the Employer which were incurred or which relate to events occurring before the Novation Date*. The Substitute Party is entitled to all of the rights to which the Original Party was entitled in relation to the Main Contract, including rights which arose *before the Novation Dat*e.
>
> 16.3 The Employer undertakes to perform and be responsible for its obligations under the Main Contract in favour of the Substitute Party, including obligations which were incurred or which relate to events occurring *before the Novation date*. The Employer will continue to be bound by the Main Contract as if the Substitute Party was an original party to the Agreement in place of the Original Party. (emphasis added)

[34] Having appraised the relevant terms of the novation agreement abovesaid, with respect, we are unable to agree with the finding and reasoning of the learned HCJ. Instead, we agreed with learned counsel for the appellant that it was the intention of the parties that the novation agreement is only to substitute parties, whilst at the same time, maintaining all the conditions and terms of the main agreement.

[35] We concurred with counsel that since it was agreed in the novation agreement that the respondent could derive the benefits of the works from the date of the main agreement (cl. 16.2), similarly the respondent's obligation must necessarily also commence from the date of the main agreement *ie*, from 6 August 2013 (cl. 16.3).

[36] Based on the above, we agreed with the appellant's counsel that the legal effects of the novation agreement are as follows:

(i) that respondent is deemed to have entered into the main contract (letter of award) in place of the original party;

(ii) that as a result, the respondent can derive benefits of the works from the date of the main contract (letter of award);

(iii) that similarly, the respondent's obligations commenced from the date of the letter of award;

(iv) that in all circumstances, the respondent is deemed to have entered into the letter of award with the appellant on 6 August 2013.

[37] Thus, we agreed in the facts and circumstances of the case before him, the adjudicator did not possess the necessary statutory authority to adjudicate and to decide on the respondent's claim herein under CIPAA.

[38] Hence, as the main agreement is pre-CIPAA, we are of the considered view that the adjudicator is *sans* jurisdiction to adjudicate the respondent's claim. Consequentially, we found the AD to be flawed and void from the word go. We thus find that the learned HCJ was plainly wrong and in error in affirming the AD. On this ground alone, in our view, it is enough for this court to allow the appellant's appeals. Thus, this court set aside the said AD.

[39] Even if assuming the submissions by the respondent's counsel abovementioned are viewed to be devoid of any merit, then based on our ensuing finding to issue (iii) below, we are unchanging in our finding that the learned HCJ was clearly erroneous and plainly wrong in dismissing OS: 103.

Issue (iii)

Whether The Adjudicator Had Breached Section 12(2)(a) And (3) Of The CIPAA

[40] As for the time-period for the adjudicator to deliver/issue the AD, s. 12(2) of the CIPAA states the following:

12 Adjudication and decision

(1) ...

(2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within:

(a) forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;

(b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or

(c) such further time as agreed to by the parties.

(3) An adjudication decision which is not made within the period specified in subsection (2) is void.

[41] In *Pasukhas Sdn Bhd v. Empire Multiple Sdn Bhd & Another Case* [2019] 1 LNS 757, the following was held by the court:

> [67] Suffice to say, it is absurd for the Adjudication Decision to be improper, defective, null and void and unenforceable on the ground that there was no specified "manner the adjudicated amount is to be paid". In fact, s. 12 of the CIPAA does not spell out the consequence of a non-compliance with s. 12(5) *unlike a non-compliance with s. 12(2) with respect to the period within which the adjudicator shall decide the dispute in that under s. 12(3) an Adjudication Decision not made within the period specified in s. 12(2) is void*. (emphasis added)

[42] For issue (iii), having perused the GOJ of the learned HCJ, we noted that the learned HCJ had dismissed the appellant's submission/contention in respect of s. 12 of the CIPAA on these two grounds: firstly, because it was not pleaded/averred to in the appellant's affidavit as required under O. 28 r. 3C(1) and O. 38 r. 2(2) of the Rules of Court 2012 (ROC). Thus, the learned HCJ found that the respondent had been unjustly deprived of its right to reply pertaining to the adjudicator's alleged breach. (See: GOJ paras. 19 to 20).

[43] Secondly, on merit as to the meaning and computation of "working day" under s. 12(2)(a) and (b) of the CIPAA, the learned HCJ opined that it depends on the adjudicator's place of work/office and not where the site is located.

[44] The learned HCJ was of the view that the definition of "working day" and "site" in s. 4 of the CIPAA applies to all the other provisions of CIPAA but not to s. 12(2)(a) and (b). Premised on that finding, the HCJ ruled that the calculation is to be based on the "working days" of the adjudicator in Kuala Lumpur. Thus, based on that, learned HCJ found the adjudicator did not breach s. 12(2)(a) of, CIPAA and the AD is therefore not void. (See: GOJ paras. 22 to 23).

[45] On the other hand, the submission of learned counsel for the appellant is simply this. CIPAA mandates the adjudicator to deliver/issue the AD within a prescribed number of working days. Counsel argued that the "working days" must be calculated based on the location/site of the project which is, Johor Bahru, Johor Darul Takzim and not the location of the

A adjudicator's office which is Kuala Lumpur. The counsel maintained that Mr Foo Joon Liang, the adjudicator, had delivered his AD beyond the mandatory 45 working days.

[46] According to the appellant's counsel, the AD was delivered beyond 45 working days from the service of the respondent's adjudication response
B (AR). To fortify its contention, the appellant referred to s. 4 of the CIPAA which defines "working day" and "site" as:

> **4. Interpretation**
>
> "working day" means a calendar day but exclude weekends and public
C holidays applicable at the State or Federal Territory **where the site is located**.
>
> "site" means the place where the construction work is affixed whether on-shore or off-shore. (emphasis added)

[47] According to the appellant, the respondent served its adjudication
D response (AR) on the adjudicator on 18 July 2019. Therefore, the AD must be delivered latest by 25 September 2019. Instead, the adjudicator only delivered the AD on the forty-sixth day, on 26 September 2019. In so doing, the adjudicator had exceeded his jurisdiction, making the AD void and unenforceable.

E *Our Findings/Ruling*

[48] Having considered the submissions by both counsels aforesaid, with respect, we are unable to agree with the learned HCJ's finding and interpretation of s. 12(2)(a) and (b). We cannot fathom the HCJ's ruling that
F the definition of "working day" and "site" in s. 4 of the CIPAA applies to all the other provisions of CIPAA but not to s. 12(2)(a) and (b).

[49] In our considered view, the learned HCJ had erred in computing and in interpreting the law and facts relating to s. 12(2) and (3) of the CIPAA. From our perspective, s. 4 of CIPAA is clear, plain and unambiguous
G pertaining to the meaning and calculation of "working day". It refers to a calendar day "where the site is located". Section 4 of the CIPAA stipulates:

> "working day" means a calendar day but exclude weekends and public holidays applicable at the State or Federal Territory **where the site is located**. (emphasis added)

H **[50]** As we see it, s. 4 of the CIPAA clearly defines what "working day" is. It is what the Parliament intended it to be. If the intention of the Legislature/Parliament is to make the adjudicator's office and not the project site as the basis to calculate "working day" then it would have provided as such. The learned HCJ is therefore plainly wrong in bringing external factors
I to interpret s. 4 of the CIPAA even though the provision is already crystal clear.

[51] To support the calculation for the appellant, learned counsel provided to the court the following chart:

No. of Working Days	Date	Day	Working/ Off/Public Holiday	Event	Amount Of Day(s)
1	18.7.2019	Thursday	Working	Respondent Served Adjudication Reply on the Adjudicator	45 days
	19.7.2019	Friday	Off	-	
	20.7.2019	Saturday	Off	-	
2	21.7.2019	Sunday	Working	-	
3	22.7.2019	Monday	Working	-	
4	23.7.2019	Tuesday	Working	-	
5	24.7.2019	Wednesday	Working	-	
6	25.7.2019	Thursday	Working	-	
	26.7.2019	Friday	Off	-	
	27.7.2019	Saturday	Off	-	
7	28.7.2019	Sunday	Working	-	
8	29.7.2019	Monday	Working	-	
	30.7.2019	Tuesday	Public Holiday	-	
9	31.7.2019	Wednesday	Working	-	
10	1.8.2019	Thursday	Working	-	
	2.8.2019	Friday	Off	-	
	3.8.2019	Saturday	Off	-	
11	4.8.2019	Sunday	Working	-	
12	5.8.2019	Monday	Working	-	
13	6.8.2019	Tuesday	Working	-	
14	7.8.2019	Wednesday	Working	-	
15	8.8.2019	Thursday	Working	-	
	9.8.2019	Friday	Off	-	
	10.8.2019	Saturday	Off	-	
	11.8.2019	Sunday	Public Holiday	-	
16	12.8.2019	Monday	Working	-	
17	13.8.2019	Tuesday	Working	-	
18	14.8.2019	Wednesday	Working	-	
19	15.8.2019	Thursday	Working	-	
	16.8.2019	Friday	Off	-	
	17.8.2019	Saturday	Off	-	
20	18.8.2019	Sunday	Working	-	
21	19.8.2019	Monday	Working	-	
22	20.8.2019	Tuesday	Working	-	

No. of Working Days	Date	Day	Working/ Off/Public Holiday	Event	Amount Of Day(s)
23	21.8.2019	Wednesday	Working	-	
24	22.8.2019	Thursday	Working	-	
	23.8.2019	Friday	Off	-	
	24.8.2019	Saturday	Off	-	
25	25.8.2019	Sunday	Working	-	
26	26.8.2019	Monday	Working	-	
27	27.8.2019	Tuesday	Working	-	
28	28.8.2019	Wednesday	Working	-	
29	29.8.2019	Thursday	Working	-	
	30.8.2019	Friday	Off	-	
	31.8.2019	Saturday	Off & Public Holiday	-	
	1.9.2019	Sunday	Public Holiday	-	
30	2.9.2019	Monday	Working	-	
31	3.9.2019	Tuesday	Working	-	
32	4.9.2019	Wednesday	Working	-	
33	5.9.2019	Thursday	Working	-	
	6.9.2019	Friday	Off	-	
	7.9.2019	Saturday	Off	-	
34	8.9.2019	Sunday	Working	-	
	9.9.2019	Monday	Public Holiday	-	
35	10.9.2019	Tuesday	Working	-	
36	11.9.2019	Wednesday	Working	-	
37	12.9.2019	Thursday	Working	-	
	13.9.2019	Friday	Off	-	
	14.9.2019	Saturday	Off	-	
38	15.9.2019	Sunday	Working	-	
	16.9.2019	Monday	Public Holiday	-	
39	17.9.2019	Tuesday	Working	-	
40	18.9.2019	Wednesday	Working	-	
41	19.9.2019	Thursday	Working	-	
	20.9.2019	Friday	Off	-	
	21.9.2019	Saturday	Off	-	
42	22.9.2019	Sunday	Working	-	
43	23.9.2019	Monday	Working	-	
44	24.9.2019	Tuesday	Working	-	
45	25.9.2019	Wednesday	Working		45 Working Days from 18.7.2019
46	26.9.2019	Thursday	Working		Adjudicator Delivered Decision

[52] It is pertinent to note that before this court, counsel for the respondent did not really counter the facts alluded to in the abovesaid chart.

[53] Factually, the respondent had served its adjudication reply on the adjudicator on 18 July 2019. Therefore, the adjudication decision should be delivered on 25 September 2019 being 45 working days from 18 July 2019. However, the adjudicator only delivered his decision on 26 September 2019. Thus, the adjudicator had exceeded the mandatory time period by one day.

[54] Apparently, even though the law mandates the AD must be delivered within 45 days, it does not mean that it is carved in stone. As can be seen, s. 12(2)(c) stipulates that the adjudicator shall decide the dispute and deliver the adjudication decision "within such further time as agreed to by the parties". Alas, there any agreement or consent from the parties obtained by the adjudicator to extend the delivery date for the AD beyond the mandatory 45 days. Nor was there any request by the adjudicator to extend such statutory timeline. As the adjudicator only delivered his decision on 26 September 2019, the adjudicator had exceeded the mandatory time period by one day. In our considered view, the fact that it was only one day late does not make it less fatal. This is because of the mandatory provision of s. 12(2)(a) and/or (b) of the CIPAA.

[55] Under CIPAA, s. 25 gives the adjudicator the following powers:

25. Powers of the adjudicator.

The adjudicator shall have the powers to:

(a) establish he procedures in conducting the adjudication documents by the parties;

(b) order the discovery and production of documents;

(c) set deadlines for the production of documents;

(d) draw on his own knowledge and expertise;

(e) appoint independent experts to inquire and report on specific matters with the consent of the parties;

(f) call for meetings with the parties;

(g) conduct any hearing and limiting the hearing time;

(h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;

(i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;

(j) issue any direction as may be necessary or expedient;

(k) order interrogatories to be answered;

(l) order that any evidence be given on oath;

(m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

(n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;

(o) award financing costs and interest; and

(p) extend any time limit imposed on the parties under this Act as reasonably required.

[56] It is obvious that s. 25 aforesaid did not empower the adjudicator to unilaterally extend the delivery time period of the AD. As earlier said, there was no such extension of time that was procured by the adjudicator and more crucially, the appellant had never agreed to any extension of time for the adjudicator to deliver the AD beyond the stipulated 45 working days.

[57] Predicated on abovesaid, we agreed with the submission by counsel for the appellant that the AD which was delivered one day past the mandatory 45 days pursuant to s. 12(2)(a) of the CIPAA is therefore void and unenforceable. Consequently, we find the learned HCJ had erroneously and was plainly wrong in finding the delivery of the AD by the adjudicator to be not erroneous in the circumstances.

[58] Therefore, based on the grounds aforesaid, we allowed the appellant's appeals and accordingly we set aside both the adjudicator's AD dated 26 September 2019 and the High Court's decision dated 29 July 2021. Consequentially, the order by the learned HCJ allowing the enforcement of the AD by the respondent is also set aside.

Other Issues

[59] As indicated earlier, in our view, the determination of issues (i) and (iii) above is enough to answer and to dispose both the appeals herein. However, for completeness we shall now proceed to deal with the other remaining issues and grounds raised *ie*, issues (ii), (iv), (v) and (vi).

Issue (ii) – Whether The Adjudicator Had Exceeded His Jurisdiction By Applying The Quantum Meruit Doctrine

[60] Counsel for the appellant submitted that the adjudicator had erroneously applied the doctrine of *quantum meruit* when allowing the respondent's claim. The counsel referred to s. 2 of the CIPAA which stipulates that CIPAA only applies to a construction contract made in writing. As such, the adjudicator in applying *quantum meruit*, had gone beyond the written agreement entered by the parties. The counsel referred to the respondent's claim for "variation orders" (VO claim) for which there is no written instruction nor any certification by the architect. Thus, based on s. 2 of the CIPAA, the adjudicator had no jurisdiction to determine the said claim.

[61] Further the counsel averred that the adjudicator failed to consider the appellant's rights to setoff for the losses suffered due to the respondent's defective works. The adjudicator also refused to consider the earlier quantity surveyor's (QS) valuation in VO No. 44 and no reason was given by the adjudicator for the refusal.

[62] In addition, counsel submitted that the adjudicator also allowed the respondent's claim even though the respondent's claim was suspicious, doubtful and strongly challenged by the appellant in particular, Architect Certificates No. 44 and 45 and for Variation Orders (VOs) No 26, 27-49 and 51-67. According to the counsel, the adjudicator had deliberately refused to use his power under ss. 25(f), (i) and (m) of the CIPAA.

[63] According to the counsel, the adjudicator was unsure of the quantum to be given but yet failed to invoke his power under s. 25(f), (i) and (m) to seek clarification from the parties. The counsel averred that the adjudicator has failed to obtain a clarification from the parties before making his decision on something that he was unsure of and that the amount allowed in the AD is based on the adjudicator's own assumption. The said failure had occasioned prejudice on to the appellant and clearly breached the rules of natural justice.

[64] Firstly, the learned HCJ did not accept the appellant's argument that the respondent's claim as allowed by the adjudicator was based on *quantum meruit*. Having ruled as such, the learned HCJ found that the adjudicator did not exceed his jurisdiction under s. 15(d) of the CIPAA. (See: GOJ paras. 11 to 17). We are in concurrence with the learned HCJ's finding on this issue.

[65] Next and more importantly, we are of the view that the issue relating to *quantum meruit* as raised and submitted by the appellant's counsel are matters pertaining to the merits and finding of facts by the adjudicator, for which are matters we are not to dwell into as held in *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal* [2016] 1 LNS 1522 wherein the Court of Appeal said as follows:

> [21] ... In the context of s. 15 of CIPAA, it cannot be the function of the Court to look into or review the merits of the case or to decide on the facts of the case. The facts are for the adjudicator to assess and decide on".

[66] Likewise, in the case of *ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd & Other Appeals* [2023] 7 CLJ 374, the Court of Appeal in endorsing the decision of the High Court in *EA Technique (M) Sdn Bhd v. Malaysia Marine And Heavy Engineering Sdn Bhd* [2020] 1 LNS 1264; [2020] 11 MLJ 353 held the following:

> [45] It is also evident that the merits of the adjudication decision should not be easily challenged. This is seen where Lim Chong Fong J (now JCA) hearing the same parties as above, in *EA Technique (M) Sdn Bhd*

v. Malaysia Marine and Heavy Engineering Sdn Bhd [2020] 1 LNS 1264; [2020] 11 MLJ 353 pointed out the need to respect and appreciate the merits of the adjudication decision as follows:

> [50] It is clear to me that EAT is questioning the merits of the adjudicator's decision here. This is unlike what happened in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd and Mecomb Malaysia Sdn Bhd v. VST M&E Sdn Bhd* [2018] 8 CLJ 380; [2018] MLJU 265 where the adjudicator was found to have abdicated his duty in not considering the respondent's defence therein because of having mistakenly held that he had no jurisdiction to entertain it. It cannot be disputed that the learned adjudicator dealt with the defences of EAT here but he dismissed them. The decision of the adjudicator is binding by virtue of s. 13 of the CIPAA even if he has wrongly answered the right questions or issues including on the adequacy or otherwise of adduction of evidence before him. It EAT is dissatisfied with it, the recourse is not to have it finally determined either by arbitration or litigation in court. This is the peculiar nature of statutory adjudication. It is not in dispute that the parties are presently having their disputes resolved in arbitration ('arbitration').

[67] Based on the above, we are not persuaded to go into the factual matrix of the adjudication as the appeal before us concerned the application for setting aside under s. 15 of the CIPAA.

[68] Pertaining to s. 25 of the CIPAA, we noted that the provision relates to the discretion/powers of the adjudicator. In our view, it is up to the adjudicator to exercise the said powers, based on the facts and circumstance of the case during adjudication. In our case herein, the adjudicator, chose not to exercise such power and it cannot be said that the exercise of such discretion to be wrong. Thus, we find no basis in the appellant's argument on this point.

Issue (iv) – Whether The Adjudicator Was In Breach In Correcting The AD

[69] The appellant's counsel argued that there was a denial of natural justice by the adjudicator as the correction to the AD was made without giving the appellant the opportunity to object. Premised on that, counsel submitted that the AD was improperly procured and ought to be set aside under s. 15(b) of the CIPAA. The counsel submitted that the learned HCJ was in error in not setting aside the said AD under s. 15(b) of the CIPAA.

[70] The learned HCJ found that the corrections made to the AD by the adjudicator solely involved typographical errors and no prejudice had occasioned onto the appellant. We cannot find any fault on the part of the learned HCJ here as the court is empowered under s. 12(7) of the CIPAA which provides as follows:

12. Adjudication and decision

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) The adjudicator may at any time correct any computational or typographical error on the adjudicator's own initiative or at the request of any party.

[71] Crucially, it is pertinent to note that, for the final correction (the third corrected AD), the adjudicator did take into account the views expressed by both sides in their respective letters. Thus, the claim by the appellant of being denied natural justice by the adjudicator, in our considered view, is clearly without basis. Hence, we find no error nor any breach of s. 12 by the adjudicator here.

Issue (vi) – Whether The Court Can Review The AD Pursuant To Section 15 of CIPAA?

[72] As for issue (vi), the learned HCJ rule that an AD cannot be varied in a setting aside application under s. 15 of CIPAA. (See: GOJ paras. 30 thr 33). In *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728, the court held as follows:

(1) Under CIPAA, there is no right of appeal against the decision of the adjudicator which is interim in nature or of temporary finality only. Section 15 provides limited grounds on which the decision of the adjudicator may be set aside. **Since an application under s. 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits**. In the premises, the criticism of the adjudication decision by the applicant must clearly point to a breach of natural justice or a jurisdictional error in the adjudication process. (emphasis added)

[73] We therefore agreed with the learned HCJ's finding and ruling that an AD cannot be varied in a setting aside application under s. 15 of the CIPAA.

Issue (vii) - Whether The AD Should Be Stayed Pending Disposal Of Arbitration

[74] Finally, for issue (vii), based on our finding on issue (i) and (iii) aforementioned, in our view, the application for a stay of enforcement (OS: 121) is now academic. Nevertheless, based on our findings for issues (i) and (iii) wherein we found clear unequivocal errors on the part of the adjudicator, in our considered view, injustice would be occasioned on the appellant if the respondent is allowed to enforce the AD which is void and unenforceable. Hence, we find merit to grant a stay of enforcement of the AD

pending arbitration. We are guided by the case of *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479 wherein the Federal Court held as follows:

> [82] We are in agreement with the contention of the appellant that a more liberal reading of s. 16 of the CIPAA would allow some degree of flexibility to the courts to stay the award where there are **clear errors, or to meet the justice of the individual case** ... (emphasis added)

[75] Thus, to recapitulate, based on our abovesaid decision, the order of the learned HCJ in dismissing the appellant's application for stay of enforcement pending arbitration is also set aside accordingly.

Conclusion

[76] After having appraised the records of appeal wholly and having considered the submissions by learned counsels for both sides, based on the reasons aforementioned, we unanimously allowed both the appeals with costs of RM5,000 subject to allocatur for each appeal.